THE LAW OF ANNEXED TERRITORY,

AS DECLARED BY THE SUPREME COURT OF THE UNITED STATES.

THIS article will deal succinctly with two subjects: first, the controversy which has existed as to the legal power of the United States to annex territory; and second, the rights of the inhabitants of the territory annexed, as these rights have been declared by the Supreme Court of the United States.

In states of the more common type no question can arise as to their legal power to acquire sovereignty over and title in new territory. That power is recognized by international law; and it may be safely asserted that no restriction upon it will be found in their internal political arrangements. But the case is different with a body politic like the United States, under the Articles of Confederation or under its present constitution, where the government has only certain enumerated powers. Although the existence of the power of annexation cannot be questioned by other states, the power does not exist *de jure* for its own citizens without an express grant in the constitution.

I.

The Articles of Confederation expressly provided for annexation in a particular case, that of Canada;[1] but the Confederation never annexed territory that was new in the sense of not having been a part of the component states. It did, however, acquire jurisdiction over and title in land that was originally a part of these states.

The Congress of the Confederation, on the 6th of September, 1780, recommended that the several states having claims to waste and unappropriated lands in the western country should

[1] "Article 11. Canada, acceding to this confederation and joining in the measures of the United States, shall be admitted into and entitled to all the advantages of this union: but no other colony shall be admitted into the same unless such admission be agreed to by nine States."

cede to the United States liberal portions of their respective claims for the common benefit of the Union. On the 20th of December, 1783, Virginia passed an act of cession, authorizing the delegates of the state in the Congress of the United States to

> convey, transfer, assign and make over unto the United States in Congress assembled, for the benefit of the said states, . . . all right, title and claim, as well of soil as of jurisdiction, which the said commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying and being to the northwest of the river Ohio,

subject to the terms and conditions contained in the act of Congress of the 13th of September, 1783. In pursuance of this authority Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe, on the 1st of March, 1784, executed a conveyance of the said territory to the United States. This grant was accepted by the Confederation.[1] When the development of the slavery question had made the conditions of this grant very important, the supreme court declared, through Chief Justice Taney, that the Congress of the Confederation "had no power to accept it [the northwest territory] under the Articles of Confederation."[2]

The Constitution of the United States, unlike the Articles of Confederation, is entirely silent as to the acquisition of new territory. The title to the territory which had been acquired by the Confederation was by implication confirmed by section 3, article 4, of the constitution, which gave Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.[3] In December, 1789, however, North Carolina passed an act authorizing its senators to cede to the United States its jurisdiction and title over its western territory. The power so conferred was exercised by deed dated February 25, 1790, and this cession was accepted by Congress in the act

[1] Poore, Charters and Constitutions, vol. i, p. 429.
[2] Scott *vs.* Sanford, 19 How. 393.
[3] *Ibid.*

approved April 2, 1790.[1] No question seems ever to have been raised as to the constitutional power of the United States to acquire this territory.

The first acquisition by the United States of territory external to its limits at the time of the adoption of the federal constitution was that of Louisiana in 1803; and the power to make such acquisition came under discussion in connection with the treaty of cession between France and the United States. Article 1 of the treaty contains these words:

> The First Consul of the French Republic [Napoleon Bonaparte], desiring to give to the United States a strong proof of his friendship, doth hereby cede to the United States, in the name of the French Republic, forever and in full sovereignty, the said territory [the colony or province of Louisiana] with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French Republic in virtue of the above-mentioned treaty concluded with His Catholic Majesty.

The doubts of the statesmen of that day in regard to the legal authority for making this treaty are well known.[2] Mr. Jefferson, then President of the United States, frankly admitted that no authority for this treaty which he had caused to be made could be found in the constitution, and he drafted one or more constitutional amendments to cover the case. Mr. Madison and Mr. John Quincy Adams were of the same opinion. Attorney-General Lincoln thought that the difficulty could be met by so wording the treaty that the new territory should appear to be the extension of the territory of one or more of the states of the Union. Mr. Gallatin scouted this device, and asserted the doctrine that the power of annexation was inherent in the United States as a sovereign. Wilson Cary Nicholson found the warrant for the annexation of Louisiana in the treaty-making power. According to Mr. Henry Adams, the debates in the Senate and House decided only one point: "Every speaker, without distinction of party, agreed that the United States government had power to acquire new

[1] Poore, Charters and Constitutions, vol. ii, p. 1665.

[2] Henry Adams, History of the United States, vol. ii, chs. iv and v.

territory, either by conquest or by treaty." [1] Thereafter no doubts seem to have disturbed the minds of American statesmen as to the power of annexation.

The Louisiana case was not, however, equally decisive of the question whether this power of annexation was to be exercised by the legislative branch of the government or by the treaty-making power. Louisiana was annexed by the treaty-making branch of the government. Mr. Benton, it is true, discussing the annexation of Texas, says:

> Acquisitions of territory had previously been made by legislation and by treaty, as in the case of Louisiana in 1803, and of Florida in 1819, but these treaties were founded upon legislative acts, — upon the consent of Congress previously obtained, and in which the treaty-making power was but the instrument of the legislative will.[2]

This statement seems to be entirely erroneous.

When the question as to the admission of Texas arose in March, 1845, a resolution was passed in the House of Representatives signifying the consent of Congress to the annexation of Texas as a state. When the resolution reached the Senate it was amended by adding an alternative provision, that if the President of the United States, in his judgment and discretion, should deem it most advisable, instead of proceeding to submit the foregoing resolution to the Republic of Texas as an overture on the part of the United States for its admission, he might negotiate with that Republic, *etc.*[3] Mr. Benton states that the resolution of the House could not have passed the Senate unless combined with the provision as to negotiation.[4] The annexation of Texas was, however, actually effected under the authority of Congress, without further negotiation.

Florida, California and Alaska were annexed through the treaty-making branch of the government. Furthermore, in the negotiation of the treaty for the annexation of the Hawaiian

[1] History of the United States, vol. ii, p. 113.
[2] Thirty Years in the United States Senate, vol. ii, p. 600.
[3] 5 Statutes at Large, 598.
[4] Thirty Years in the United States Senate, vol. ii, p. 635.

Islands in 1893, the president assumed that the power of annexation was vested in the treaty-making power.

On the other hand, the method of annexation by legislative authority has been adopted in the case of the Guano Islands. It is provided by section 5570 of the Revised Statues:

> Whenever any citizen of the United States shall discover deposits of guano on any island, rock or quay not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and shall take peaceable possession thereof, and occupy the same, said island, rock or quay may, at the discretion of the President of the United States, be considered as appertaining to the United States.

Both of the above views as to the method of exercising the power of annexation have been approved by the Supreme Court of the United States. In the case of the American Insurance Company *vs.* Canter,[1] decided in 1828, that court, speaking through Chief Justice Marshall, said :

> The constitution confers absolutely on the government of the Union the power of making wars and of making treaties. Consequently, that government possesses the power of acquiring territory, either by conquest or treaty.

In the case of Fleming *vs.* Page,[2] the court, speaking through Chief Justice Taney, said :

> The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. *But this can be done only by the treaty-making power, or the legislative authority*, and is not a part of the power conferred upon the President by the declaration of war.

In Dred Scott *vs.* Sanford, the opinion of the court seems to be that the power to acquire new territory is derived from the power to admit new states into the Union.[3] But in the later case of Mormon Church *vs.* United States,[4] the court said:

[1] 1 Peters, 542.
[2] 9 How. 614.
[3] 19 How. 446, 447.
[4] 136 U. S. 42.

The power to acquire territory, other than territory northwest of the Ohio River (which belonged to the United States at the adoption of the constitution) is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty.

This latter opinion seems to hold that conquered land becomes territory of the United States in the legal sense by the mere fact of conquest. If this is the meaning, the opinion of the court cannot be reconciled with the opinion in Fleming *vs.* Page.

It will thus be seen that various opinions have been held upon the point under discussion:

First, it has been held that the Confederation had no power of annexing territory.

Second, there is high authority for the opinion that the present United States has no constitutional power to acquire territory.

Third, it has been said that the United States has that power as an inherent right of sovereignty.

Fourth, it has been said that the United States has that power as incident to the treaty-making power.

Fifth, it seems to have been held that the power of annexing territory is derived from the power of admitting new states into the Union.

Sixth, it has been held that the power of annexation should be exercised through the treaty-making power.

Seventh, it has been contended that territory can be annexed only by virtue of legislative authority.

Eighth, it has been decided that conquest does not operate annexation.

While the power of annexation has ripened by precedent into an unquestioned power, it may still be matter of debate whether such annexation must be authorized by legislation, or can be exercised by the treaty-making power without previous legislative authority.

II.

The question as to the rights of the inhabitants of annexed territory may be conveniently treated under four heads:

First. What law is in force in annexed territory antecedently to legislation by Congress?

Second. Do the laws of the United States operate *proprio vigore* in annexed territory?

Third. How far do treaty stipulations create rights in the inhabitants of annexed territory?

Fourth. In whom is the government of annexed territory vested?

(1) *What law is in force in annexed territory antecedently to legislation by Congress?* The law of the United States has adopted the principle which belongs both to the common law and to international law, that upon the acquisition of territory, either by conquest or treaty, the laws in force in the conquered territory regulating the civil rights of its inhabitants remain in force until changed by the conqueror, and vested rights of individuals in property are not affected by the change. In American Insurance Co. *vs.* Canter,[1] Chief Justice Marshall said:

> On such transfer of territory (by treaty) it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it, and the law which may be denominated political is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the state.[2]

[1] 1 Peters, 542.

[2] *Cf.* also De Lassus *vs.* United States, 9 Pet. 117; Strother *vs.* Lucas, 12 Pet. 410; United States *vs.* Power, 11 How. 570; Cross *vs.* Harrison, 16 How. 193; Jones *vs.* Master, 20 How. 8; Chicago & Pacific Ry. Co. *vs.* McGlinn, 114 U. S. 546.

An important limitation upon the above principle was announced in the case of United States *vs.* Repentigny,[1] where it was said:

On a conquest by one nation of another, and the subsequent surrender of the soil and change of sovereignty, those of the former inhabitants who do not remain and become citizens of the victorious sovereign, but, on the contrary, adhere to their old allegiance and continue in the service of the vanquished sovereign, deprive themselves of protection or security to their property except so far as it may be secured by treaty. . . .

Hence, where on such a conquest, the treaty provided that the former inhabitants who wished to adhere in allegiance to their vanquished sovereign might sell their property, provided they sold it to a certain class of persons and within a time named, the property, if not so sold, became abandoned to the conqueror.

(2) *Do the laws of the United States operate* proprio vigore *in annexed territory?* At common law the laws of England did not extend to territory acquired by conquest or treaty. The dominion over such territory and its citizens was vested exclusively in the crown until such time as Parliament legislated for it. It was usual in such cases to treat the original laws of the country as being in force, but they were in force, not *proprio vigore*, but by the assent of the crown.

Our colonies are either those where lands are claimed by right of occupancy only, by finding them desert and uncultivated and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest or ceded to us by treaties.

In each of these last-mentioned cases the king has either retained in his hands the right of legislating exclusively for the colony, or he has granted to it the privilege of a local legislature with the power of making laws for its internal government. In the case of an uninhabited country discovered and planted by English subjects, all the English laws then in being, which were the birthright of every subject, are immediately there in force.[2]

[1] 5 Wall. 211.

[2] Dwarris on Stats. 905. "The laws of a conquered colony continue in force until they are altered by the conqueror." — *Ibid.* 906. See also Calvin's Case, 7 Reports, 170.

To the same effect is the opinion of Mr. Justice Blackstone:

> In acquired or ceded countries that have laws of their own, the King may indeed alter and change those laws; but till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country. Our American plantations are principally of this latter sort, for they were obtained in the last century, either by right of conquest and driving out the natives (with what natural justice I do not at present inquire) or by treaties. And therefore the common law of England as such has no allowance or authority over them, they being no part of the mother country, but distinct though dependent dominions. They are subject, however, to the control of Parliament, though like all others, not bound by any acts of Parliament unless particularly named.[1]

But this settled rule of the common law was foreign to the political ideas of this country, and as a natural result it has not only been supplanted by an entirely different rule, but its existence seems to have been ignored by the courts and the statesmen of the United States.

The first case in the Supreme Court of the United States in which the present point came under consideration was that of Loughborough *vs.* Blake, decided in 1820.[2] The question before the court in that case was whether Congress had the right to impose a direct tax on the District of Columbia. The court decided that it had, and referred the power to the eighth section of the first article of the constitution, which gives Congress the "power to collect taxes, duties, imposts and excises." It held also that this power was subject to the constitutional provision that "all duties, imposts and excises shall be uniform throughout the United States." The court was of the opinion that by virtue of these two clauses the power to tax could be exercised through-

[1] 1 Blackstone, 108. "The main question was, whether or not this statute did concern those islands, and *per curiam* it doth not; for all islands and other places *extra quatuor maria*, though they are part of the King's dominion, are not governed by the laws of England unless it were so appointed by act of Parliament." Dawes *vs.* Painter, Freeman, 175.

[2] 5 Wheaton, 317.

out the United States, and that the name United States included the whole area, not only of the states, but of the territories, whether original territory or acquired territory. It said:

> Does this term [*i.e.*, United States] designate the whole or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic which is composed of states and territories. The District of Columbia, or the *territory west of the Missouri*, is not less within the United States than Maryland or Pennsylvania.

The court also held that the twentieth section of the first article of the constitution, declaring that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers," and the fourth paragraph of the ninth section, stating that "no capitation or other direct tax shall be levied unless in proportion to the census or enumeration hereinbefore directed to be taken," were in force in the District of Columbia. On the principle declared by the court they apply also to annexed territory.

The next reference by the Supreme Court of the United States to the present question is in the opinion of Chief Justice Marshall, in the case of the American Insurance Co. *vs.* Canter, decided in 1828.[1] In this case, speaking of the treaty of February 22, 1819, between the United States and Spain, by which the latter ceded to the former the territory of Florida, Chief Justice Marshall said :

> This treaty is the law of the land and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States. *It is not necessary to inquire whether this is not their condition independently of stipulation.*

In Fleming *vs.* Page,[2] which was decided in 1849, Chief Justice Taney, in delivering the opinion of the court, touched upon this subject. This case decided only that territory in military

[1] 1 Peters, 542. [2] 9 How. 617.

occupation was not territory of the United States within the meaning of the constitution and laws, and that the revenue laws did not extend to such territory. In the opinion of the court, however, Chief Justice Taney made the statement that after the annexation of Florida that territory continued to be treated by the government of the United States as foreign territory within the meaning of the revenue laws, and that duties were collected on goods shipped from Florida to the United States. "This construction of the revenue laws," said he, "has been uniformly given by the administrative department of the government in every case that has come before it." He also stated that the same rule was applied in the case of Louisiana.

> The Department [*i.e.*, the Treasury] in no instance that we are aware of since the establishment of the government has ever recognized a place in a newly acquired territory as a domestic port from which the coasting trade might be carried on, unless it had been previously made so by act of Congress.

This, of course, is an opinion to the effect that the revenue laws do not *proprio vigore* extend to annexed territory.

The first case in which there was an express adjudication upon this point was Cross *vs.* Harrison, decided in 1853.[1] The facts of the case were as follows: On February 3, 1848, California was in the military occupation of the United States. On that day a treaty of peace was made between the United States and Mexico, by which the latter ceded California to the former. Ratifications were exchanged on May 30, 1848, and notice of the treaty was received in California on August 7, 1848. On March 3, 1849, Congress passed an act extending the customs laws of the United States to California and making San Francisco a port of entry; and on November 13, 1849, a collector for the port was appointed. Cross, Hobson & Co. imported goods from foreign countries into California between February 3, 1848, the date of the treaty, and November 13, 1849, when the collector was

[1] 16 How. 181.

appointed. Some of these goods were imported between the date of the treaty and May 30, 1848, the date of its ratification; some between the latter date and August 7, 1848, when notice of the treaty was received in California; some between the latter date and March 3, 1849, the date of the act of Congress; and others between the latter date and November 13, 1849. Duties were collected by the United States on all these goods. The duties collected between February 3, 1848, and August 7, 1848, were at the rates prescribed by the military authorities; those collected between August 7, 1848, and March 3, 1849, were at the rates prescribed by the revenue laws of the United States. All the duties were collected by the military authorities.

One of the questions presented to the court by this state of facts was, whether or not the duties collected between the date of the ratification and that of the act of Congress had been lawfully collected; and the court decided that they had been, on the ground that the revenue laws were in force in the territory immediately on its annexation. Against the government it was urged

that as Congress has the constitutional power to regulate commerce, and had not done so *specifically* in respect to tonnage and import duties in California, that none of the existing acts of Congress for such purposes could be applied there until Congress had passed an act giving to them operation, and had legislated California into a collection district, with denominated ports of entry.

To this argument the court answered:

By the ratifications of the treaty California became a part of the United States. And as there is nothing differently stipulated in the treaty with respect to commerce, *it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage.* It was bound by the eighteenth section of the act of 2d March, 1799. . . .

The acts of the 20th July, 1790, and that of 2d March, 1799, were also of force in California without other special legislation declaring them to be so. . . .

The ratification of the treaty made California a part of the United States, and . . . as soon as it became so, the territory became sub-

ject to the acts which were in force to regulate foreign commerce with the United States, after those had ceased which had been instituted for its regulation as a belligerent right.[1]

It is worthy of note that in the same case the court held that the collection of duties between the date of the ratification of the treaty and that of legislation by Congress was legal upon other grounds. In regard to the duties collected between the date of the ratification of the treaty and that of the notification of the treaty to the military authorities of California, the court was of opinion that they could not be recovered, because they had been paid voluntarily.[2] As regards the duties paid between the date of notice of the treaty to the military authorities of California and that of legislation by Congress, the court held that they were legally collected, because the military government then existing in California had lawful authority to collect them.[3] It would seem that the duties collected in the preceding period were legal on the same ground. It is therefore true that the opinion as to the operation of the laws of the United States in California previous to legislation was not necessary to the decision of the case.

As a result of the two cases last considered there has arisen a somewhat peculiar situation. Under the decision in Cross *vs.* Harrison, duties may be levied, under existing revenue laws, on goods coming from a foreign country into annexed territory; and, according to Fleming *vs.* Page, duties may be levied on goods passing from annexed territory into original territory of the United States.

In the celebrated Dred Scott Case,[4] decided in 1856, the court held that in territory annexed since the adoption of the federal constitution the provisions of that instrument became operative immediately upon annexation. The court said:

When the territory becomes a part of the United States the federal government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined and limited by the constitution, from

[1] 16 How., pp. 197, 198.
[2] *Ibid.*, p. 192.
[3] *Ibid.*, p. 195.
[4] Dred Scott *vs.* Sanford, 19 How. 449.

which it derives its own existence, and by virtue of which alone it continues to exist and act as a government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a territory of the United States, put off its character and assume discretionary or despotic powers which the constitution has denied it. It cannot create for itself a new character separated from the citizens of the United States and the duties it owes them under the provisions of the constitution. The territory being a part of the United States, the government and the citizen both enter into it under the authority of the constitution, with their respective rights defined and marked out, and the federal government can exercise no power over his person or property beyond what that instrument confers, nor lawfully deny any right which it has reserved.

The same doctrine was held in National Bank *vs.* County of Yankton.[1] In Chicago & Pacific Ry. Co. *vs.* McGlinn,[2] the opinion is still more far-reaching. It was held in that case not only that the powers of Congress were limited in annexed territory by the provisions of the constitution, but that the constitution operated to invalidate all laws of the annexed territory in conflict with its provisions, and that all of the laws of the annexed territory were superseded by the existing laws of the new government upon the same matters.

In the case of California *vs.* Pacific R.R. Co.,[3] decided in 1887, it was held that the eighth section of article I of the constitution, granting Congress power to regulate commerce with all foreign nations and among the several states, extended to commerce between the states and territories. This case has an important bearing upon a point connected with, but not discussed in, the opinion in Fleming *vs.* Page. If, as was stated there, the revenue laws of the United States authorize duties to be levied upon goods brought from annexed territory into original territory of the United States, the question arises whether the enactment of such laws is in the power of Congress — whether Congress *can* lay a tariff between original and annexed territory. This question is settled in the affirmative by the decision in California *vs.* Pacific R.R. Co.

[1] 101 U. S. 129. [2] 114 U. S. 542.
[3] 127 U. S. 1.

The last case upon the subject is that of Mormon Church *vs.* United States,[1] decided in 1890. The court held that Congress had power to legislate for the territory, but that in doing so it was subject to the fundamental limitations of the constitution in favor of personal rights. This opinion coincides with that given in the case before cited. The chief interest of the Mormon Church case is in the reasoning upon which the above opinion is founded. The court said :

> These limitations [*i.e.*, constitutional limitations] upon the power of Congress would exist *rather by inference and the general spirit of the constitution*, from which Congress derives all its powers, than by any express application of its provisions.

It has been seen that in the case of Loughborough *vs.* Blake the court held that the constitution *ex vi termini* extended to the territories. In the Dred Scott case, however, in which it was also held that the constitutional provisions extended to annexed territory, the court did not rest its opinion upon this ground. Indeed, it admitted that there is no express regulation in the constitution defining the power which the general government may exercise over the person or property of a citizen in a territory, and declared that Congress must look to the *provisions and principles of the constitution and its distribution of powers* for a solution of that question. Finally, in Mormon Church *vs.* United States, the court rests its opinion upon *inference and the general spirit of the constitution.*

It has been the practice of Congress, upon the acquisition of territory, to extend the laws of the United States to such territory by express legislation. This was done in regard to Louisiana, Florida, California and New Mexico.[2] It may be mentioned incidentally that on the accession of North Carolina and Rhode Island to the Federal Union the revenue laws of the United States were by statute extended to those states.[3] On the annexation of Texas the laws of the United States were

[1] 136 U. S. 42.

[2] Statutes at Large, II, 285; III, 654; IX, 400, 452.

[3] 1 Statutes at Large, 99 and 126.

reënacted as to that state.[1] The criminal laws of the United States were extended by statute to the Guano Islands.[2]

3. *How far do treaty stipulations create rights in the inhabitants of annexed territory?* By the third article of the treaty between France and the United States for the cession of Louisiana it was provided that

> the inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess.

In the case of New Orleans *vs.* Armas,[3] decided in 1835, Chief Justice Marshall held that until the admission of Louisiana the inhabitants were protected in the free enjoyment of their liberty, property and religion :

> Had any one of these rights been violated while this stipulation continued in force, the individual supposing himself to be injured might have his case brought into this court under the twenty-fifth section of the Judiciary Act.

A similar opinion was expressed by Chief Justice Marshall in the case of Delassus *vs.* United States.[4] The effect of these decisions seems to be that the clause as to the "rights, advantages and immunities of citizens of the United States" meant to secure such rights, advantages and immunities on the admission of the state into the Union.

The sixth article of the treaty with Spain for the cession of Florida, ratified February 22, 1821, contains these words :

> The inhabitants of the territories which His Catholic Majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal constitution, and admitted to the enjoyment of all the privileges, rights and immunities of the citizens of the United States.

[1] 9 Statutes at Large, 1.
[2] 11 Statutes at Large, 119.
[3] 9 Peters, 235.
[4] *Ibid.*, 117.

In the case of the American Insurance Co. *vs.* Canter,[1] decided in 1828, Chief Justice Marshall said: "This treaty is the law of the land and *admits* the inhabitants to the enjoyment of the privileges, rights and immunities of the citizens of the United States." The language of the French treaty was substantially the same as that of the Spanish; but it will be seen that while the former was construed as operating as a contract to give future rights, the same words in the latter were declared to create immediate rights. In the case of Foster *vs.* Neilson, decided in 1829,[2] the court, in passing upon the eighth article of the treaty of 1819 with Spain, in which the language is similar to that considered in the two cases just cited, held that a stipulation for legislation addressed itself to the political branch of the government. These cases left it doubtful whether a treaty which granted rights to the inhabitants of ceded territory by language *in presenti* could be enforced by the courts of the United States.

In the Head Money cases,[3] the supreme court gave an explicit opinion on this point. It held that, while a treaty is primarily a compact between independent nations, depending for its enforcement upon the action of the parties thereto, it may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other—provisions which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. Of this latter character are treaties which regulate the relations of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty as it would to a statute for a rule of decision for the case before it. This opinion was reasserted in United States *vs.* Rauscher.[4]

In the case of Chae Chan Ping *vs.* United States, the

[1] 1 Peters, 542.
[2] 2 Peters, 253.
[3] 112 U. S. 598.
[4] 119 U. S. 418.

opinion was expressed that a treaty repealed an existing statute.[1] By the treaty of annexation concluded, on February 14, 1893, by President Harrison with the Hawaiian Islands, but withdrawn by President Cleveland, the treaty-making power of the United States assumed to stipulate for the repeal of certain existing laws of the United States. It was provided that the land laws of the United States should not apply to lands in the Hawaiian Islands. It was provided that the existing government and laws of the Hawaiian Islands should continue, no exception being made in regard to those of the Hawaiian laws which might be in conflict with the constitution and laws of the United States. It was further implied in the provisions of the treaty that the laws of the United States respecting imports, internal revenue, commerce and navigation were not to be considered as applicable to the Hawaiian Islands. It is obvious from the foregoing review that the question as to the validity of these stipulations would have been directly presented if the treaty had been ratified.

That rights created by a treaty are conditional and precarious is apparent from the fact that Congress may, by a statute enacted after the making of a treaty, repeal its provisions.[2] In the case of Bartram *vs.* Robertson,[3] the facts were these : On January 12, 1858, the United States agreed with Denmark to claim no duties upon goods imported from Denmark into the United States, higher than those imposed upon like articles imported from any other country. Under the act of July 14, 1870, duties were imposed by the United States upon certain goods. By the treaty of January 30, 1875 with the Hawaiian Islands, the same goods were admitted from the latter country at a lower rate than those prescribed by the act of July 14, 1870. It was held that under the treaty the Danish goods should be admitted at the rates prescribed for the Hawaiian Islands. The court said :

[1] 130 U. S. 600.

[2] The Cherokee Tobacco, 11 Wall. 616; United States *vs.* McBratney, 104 U. S. 621; Whitney *vs.* Robertson, 124 U. S. 190; Bottiler *vs.* Dominguez, 130 U. S. 238; Chae Chan Ping *vs.* United States, 130 U. S. 581.

[3] 122 U. S. 116.

It did not lie with the officers of customs to refuse to follow its directions [those of the act of 1870] because of the stipulations of the treaty with Denmark. Those stipulations, even if conceded to be self-executing by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration.

In the case of Chae Chan Ping *vs.* United States, cited above, the supreme court held that the power of Congress to repeal the provisions of a previous treaty is a constitutional power, and not merely a *de facto* power. The court said that by the constitution laws and treaties are both the supreme law of the land, and no paramount authority is given to one over the other. In either case the last expression of the sovereign will must control.

That, as a matter of fact, Congress has not hesitated to exercise the power of defeating treaties is apparent from the legal history of territories annexed by the United States. In regard to one of these Mr. Henry Adams has said :

Louisiana received a government in which its people, who had been solemnly promised all the rights of American citizens, were set apart, not as citizens, but as subjects lower in the political scale than the meanest tribes of Indians, whose right to self-government was never questioned.[1]

4. *In whom is the power to govern annexed territory vested?* Congress has in fact exercised legislative power over all territory annexed by the United States. On the 31st of October, 1803, an act was passed directing that

all military, civil and judicial powers exercised by the officers of the existing government shall be vested in such person or persons, and shall be exercised in such manner, as the President of the United States shall direct, for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property and religion.[2]

On March 26, 1804, another act was passed, vesting all the executive powers in Louisiana in a governor, to be appointed by

[1] History of the United States, vol. ii, p. 125.

[2] 2 Statutes at Large, 245.

and removable by the President of the United States ; and all legislative powers in the governor and a council of thirteen, to be appointed by the president.[1] The same provision was made for Florida by acts of March 3, 1819 and March 30, 1822.[2] On the cession of New Mexico by Texas, Congress vested the executive authority over that territory in a governor, and the legislative power in the governor and a legislative assembly, consisting of a council and house of representatives to be elected by the people. It also provided that the constitution and laws of the United States which were not local in their application should have the same force and effect in the territory of New Mexico as elsewhere within the United States.[3]

In the debate on the first bill providing a government for Louisiana, the constitutional power of Congress to govern annexed territory was denied; but the existence of that power has been repeatedly affirmed by the supreme court.[4] While, however, the decisions agree in asserting the power of Congress to govern annexed territory, the constitutional source of this power has never been authoritatively settled. In the case of Seré *vs.* Pitot,[5] decided in 1810, Chief Justice Marshall said :

> The power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the constitution of the United States declares that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

In American Insurance Co. *vs.* Canter, decided in 1828, the Chief Justice expressly adhered to this opinion, but seemed to incline more to the view that the power to govern territory was derived from the last cited clause of the constitution. In the Dred Scott case it was held that this clause applied only to the

[1] 2 Statutes at Large, 283.

[2] 3 Statutes at Large, 524, 565.

[3] 9 Statutes at Large, 446.

[4] American Ins. Co. *vs.* Canter, 1 Peters, 542 ; Cross *vs.* Harrison, 16 How. 164 ; National Bank *vs.* County of Yankton, 101 U. S. 129 ; Mormon Church *vs.* United States, 136 U. S. 42; Jones *vs.* United States, 137 U. S. 202.

[5] 6 Cranch, 336.

territory which belonged to or was claimed by the United States when the constitution was adopted, but had no application to territory afterwards acquired. As to such latter territory the power of Congress to govern was, the court said, an incident of the power to acquire. In the case of National Bank *vs.* County of Yankton,[1] the court declared that the power of Congress over annexed territory had always been conceded, but expressed no opinion as to the source of such power; while in the latest case, that of Mormon Church *vs.* United States,[2] both the possible sources were recognized, and the power was said to be derived from the territorial clause in the constitution, and also to be incident to the right to acquire territory.

As to the scope of Congressional power over annexed territory, there is an irreconcilable difference between the views of the legislature and of the judiciary. From the cases cited it is clear that the supreme court has uniformly held that the power of Congress is subject to the limitations on its powers imposed by the constitution. But from the several territorial acts above cited it is equally clear that Congress has assumed to exercise unlimited power.

That the government of acquired territory between the date of the cession and that of legislation by Congress is vested in the president, is one of the points decided in the case of Cross *vs.* Harrison. In that case the court held that the military government of California had lawful authority to collect duties between the time at which it received notice of the treaty of annexation and the date of legislation by Congress. How chary the administration of that day was in exercising power is curiously shown by the following dispatch of Mr. Buchanan, Secretary of State under President Polk, dated October 7, 1848:

> In the meantime, the condition of the people of California is anomalous, and will require, on their part, the exercise of great prudence and discretion. By the conclusion of the treaty of peace, the military government which was established over them under the laws of war, as recognized by the practice of all civilized nations, has ceased to derive its authority from this source of power. But is there for

[1] 101 U. S. 129. [2] 136 U. S. 42.

this reason no government in California? Are life, liberty and property under the protection of no existing authorities? This would be a singular phenomenon in the face of the world, and especially among American citizens, distinguished as they are above all other people for their law-abiding character. Fortunately they are not reduced to this sad condition. The termination of the war left an existing government, a government *de facto*, in full operation, and this will continue, *with the presumed consent of the people*, until Congress shall provide for them a territorial government. The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest.

It will thus be seen that Mr. Jefferson doubted his power to annex territory, and Mr. Polk his power to govern it when annexed. In the affair of annexation they acted to this extent alike, that each did what he believed he had no right to do. They differed only in this, that the former assumed without hesitation a power which was doubtful, and the latter exercised hesitatingly a power which seems to be beyond question.

From the above review of the decisions of the supreme court it appears that the law applicable to annexed territory can scarcely be said to be settled in this country. The common-law rule seems to have been displaced without comment, and a new one adopted without discussion ; but there is good ground for the contention that many of the opinions cited are rather dicta than decisions. It is possible that events will arise which will make the above change politically inconvenient, and render it desirable to treat the whole question as still open.

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